

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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**CASE NO. A-6531**

**PETITION OF DAVID AND LESLIE PHILIPPEN-MARTONE**

**OPINION OF THE BOARD**

(Opinion Adopted July 26, 2017)

(Effective Date of Opinion: August 8, 2017)

Case No. A-6531 is an application for two variances necessary for the construction of a single story room addition. The first is a variance of twelve (12) feet, needed because the proposed construction is within eight (8) feet of the rear lot line. The required setback is twenty (20) feet, in accordance with Section 59-4.4.9.B.2 of the Montgomery County Zoning Ordinance. The second is a variance of 9.50 feet, needed because the proposed construction is within 15.50 feet of the side street lot line. The required setback is twenty-five (25) feet, in accordance with Section 59-4.4.9.B.2 of the Zoning Ordinance.

The Board of Appeals held a hearing on the application on July 26, 2017. Petitioners David and Leslie Philippen-Martone appeared pro se and testified in support of the variances. In addition, the engineer who proposed the design for the Petitioners' addition was also present and testified.

Decision of the Board:                      Variances **GRANTED**.

**EVIDENCE PRESENTED**

1.     The subject property is Lot 25, Block D, 0086 Subdivision located at 9906 Dameron Drive, Silver Spring, MD, 20902, in the R-60 Zone. It is a 9,745 square foot corner lot, significantly larger than the 6,000 square foot minimum for the R-60 zone, and, based on the Zoning Vicinity Map, larger than most of the properties in the surrounding neighborhood. See Exhibits 4 and 8(b).

2.     The Statement submitted by the Petitioners states that the proposed addition is necessary to provide care for Mrs. Philippen-Martone's parents, who will be moving in with them. The Statement details the health issues of Mrs. Philippen-Martone's parents, explaining that her mother is confined to a hospital bed, and that her father, whose health is also declining, is her primary caregiver. The Statement indicates that the proposed

addition has been designed to provide "safe, efficient ingress and egress" to the home. It notes the need for the addition to be on grade in order to allow her parents to escape in the event of an emergency, because her mother is not ambulatory.

The Statement indicates that "[t]he addition, as designed, would provide [Mrs. Philippen-Martone's parents] with the accessible and sustainable living space, one that conforms to the Design for Life guidelines for people with disabilities (ADA)." It further indicates that "[t]he proposed unit will be built to ADA standards and include such features as ground level access to a wide concrete walkway, an extra wide exterior door, wide interior doors, a wide handicapped access bathroom and shower that can accommodate a special rolling bed for my mother." Finally, the Statement indicates that if Mrs. Philippen-Martone's parents were ambulatory, the Petitioners would have submitted plans for an addition above the lower level of their split level home, but unfortunately with her parents' physical state, that was not an option. See Exhibits 3(a) and 3(b).

3. The Statement indicates that the neighbors abutting and confronting the Petitioners' property support the proposed addition. See Exhibits 3(b) and 7.

4. At the hearing, Petitioner David Philippen-Martone testified that the subject property is unique because it is a corner lot with a mature maple tree and two mature holly trees in the rear yard. He testified that the proposed addition would be 600 square feet, and that approximately 250 square feet would need a variance. Mr. Philippen-Martone testified that the proposed addition would almost be a duplicate of the existing split (i.e. mirror image), with extra-wide doors and a handicapped entrance on the back to allow access for a hospital bed. He testified that he and his wife are seeking an ADA-compliant space which would allow her parents to live with them and see their grandchildren. He testified that his neighbors are very much in favor of the proposed construction. Finally, he noted that they intended to install landscaping for birds and wildlife.

5. The Petitioners' engineer testified that design of the addition would allow the Petitioners immediate access to her parents in the evening, because that is when assistance is typically needed most.

6. Petitioner Leslie Philippen-Martone testified that the size of the addition is the minimum needed to achieve their objectives, explaining that it includes a large bathroom to allow for the maneuvering of a hospital bed, a bedroom for her mother, and a sitting area for her father.

## CONCLUSIONS OF LAW

1. Section 59-7.3.2.E of the Montgomery County Zoning Ordinance, "Necessary Findings," provides that in order to grant a variance, the Board of Appeals must find that:

1. denying the variance would result in no reasonable use of the property; or
2. each of the following apply:

- a. one or more of the following unusual or extraordinary situations or conditions exist:
  - i. exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;
  - ii. the proposed development uses an existing legal nonconforming property or structure;
  - iii. the proposed development contains environmentally sensitive features or buffers;
  - iv. the proposed development contains a historically significant property or structure; or
  - v. the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;
- b. the special circumstances or conditions are not the result of actions by the applicant;
- c. the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary situations or conditions on the property;
- d. the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan; and
- e. granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.

Section 59-7.1.1 of the Montgomery County Zoning Ordinance provides that the applicant has the burden of production and has the burden of proof by a preponderance of the evidence on all questions of fact.

2. While the Petitioners have testified that their lot is a corner lot with large trees in the rear, they did not seek to argue their case under the variance standards set forth in Section 59-7.3.2 of the Zoning Ordinance. Indeed, Petitioners' testimony and the evidence of record indicates an intent to have their request considered under Title II of the Americans With Disabilities Act (ADA), as amended by the ADA Amendments Act of 2008 (ADAAA), and the Fair Housing Amendments Act of 1988 (FHAA). Thus the Board finds that the requested variances do not comply with the applicable standards and requirements set forth in Section 59-7.3.2.E of the Zoning Ordinance, and will proceed to consider whether the variances can be granted as a reasonable accommodation under the ADA/FHAA.

### **Standards for Evaluation of a Variance on ADA/FHAA Grounds**

A variance can be granted as a reasonable accommodation of a petitioner's disability under Title II of the Americans With Disabilities Act, as amended by the ADA Amendments Act of 2008, and the Fair Housing Amendments Act of 1988.

The ADAAA and FHAA define a disability, or handicap as “a physical or mental impairment that substantially limits one or more of the major life activities of (an) individual.” 42 U.S.C.A. §12102(1)(A); 42 U.S.C. §3602(h).

Whether an individual has an impairment and whether the impairment substantially limits a major life activity is to be determined on a case-by-case basis. *Dadian v. Village of Wilmette*, 269 F.3d 831, 837 (7th Cir. 2001).

#### Prohibition on Housing Discrimination Based on Disability

The FHAA and Title II of the ADA prohibit housing discrimination based on an individual's handicap or disability.

The FHAA prohibits discrimination against “any person in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling” on the basis of that person's handicap. 42 U.S.C.A. § 3604(f)(2). The FHAA definition of discrimination includes a refusal to make reasonable accommodation in “rules, policies, practices or services when such accommodation may be necessary to afford” a person with a handicap “equal opportunity to use and enjoy a dwelling.” 42 U.S.C.A. § 3604(f)(3)(B). A “necessary accommodation” to afford “equal opportunity” under FHAA will be shown where, but for the accommodation, the disabled person seeking the accommodation “will be denied an equal opportunity to enjoy the housing of their choice.” *Trovato v. City of Manchester, N.H.*, 992 F.Supp. 493, 497 (D.N.H. 1997) (citing *Smith & Lee Assocs. v. City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996)). The failure to provide reasonable accommodation need not be supported by a showing of discriminatory intent. [See *Trovato*, 992 F. Supp. at 497 (citing *Smith*, 102 F.3d at 794-96).]

#### Reasonable Accommodation by Local Government of an Individual's Disability

The “reasonable accommodation” provision of the FHAA has been interpreted to require municipalities to “change, waive, or make exceptions in their zoning rules to afford people with disabilities the same opportunity to housing as those who are without disabilities.” *Trovato*, 992 F. Supp. at 497 (citing *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3rd Cir. 1996)). Similarly, Title II of the ADA (42 U.S.C.A. §12132) has been held to apply to zoning decisions, which constitute an “activity” of a public entity within the meaning of the ADA. [See, *Mastandrea v. North*, 361 Md. 107, 126, 760 A.2d 677, 687, at n. 16 (citing *Trovato*, 992 F.Supp. at 497).]

Under the ADA, a local jurisdiction is required to reasonably modify its policies when necessary to avoid discrimination on the basis of disability, unless it is shown that the modifications “would fundamentally alter the nature of the service, program or activity.” 28 C.F.R. §35.130(b)(7) (2012). Therefore, unless the proposed accommodation would “fundamentally alter or subvert the purposes” of the zoning ordinance, the variance must be granted under Title II of the ADA. [See *Trovato*, 992 F.Supp. at 499.]

In connection with the grant of the variance on ADA and FHA grounds, the Board must make the following findings:

1. Determination of disability: An evaluation of whether a disability exists under the ADAAA or FHAA requires a three-step analysis. The applicant's medical condition must first be found to constitute a physical impairment. Next, the life activity upon which the applicant relies must be identified (i.e. walking, independent mobility) and the Board must determine whether it constitutes a major life activity under the ADAAA and FHAA. Third, the analysis demands an examination of whether the impairment substantially limits the major life activity. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

2. Non-discrimination in housing: The Board must find that the proposed variance constitutes a reasonable accommodation of existing rules or policies necessary to afford a disabled individual equal opportunity to use and enjoy a dwelling.

3. Reasonable modification of local government policies: Because a zoning ordinance is among the local governmental rules subject to Title II of the ADA and the FHAA, the Board must find that the proposed variance should be granted to the extent necessary to avoid discrimination on the basis of disability unless the proposed accommodation would fundamentally disrupt the aims of the Zoning Ordinance.

Applying the above analysis to the requested variance, the Board finds as follows:

1. Based upon the evidence of record, including the written Statements in the record at Exhibits 3(a) and (b), and on the testimony of the Petitioners, the Board finds that Mrs. Philippen-Martone's mother has a physical impairment that confines her to a hospital bed, eliminating all independent mobility. The Board further finds that this impairment not only limits her mobility, but also limits her ability to care for herself, both basic life activities for the purposes of the ADAAA and FHAA. Thus the Board finds that Mrs. Philippen-Martone's mother's impairment constitutes a disability under the ADAAA and FHAA.

2. The Board further finds that the construction of the proposed addition on the southwest side of the Petitioners' existing house, as depicted on Exhibits 4, 5(a) and 5(b), will provide Mrs. Philippen-Martone's mother and her husband with accessible living quarters and access to needed assistance from the Petitioners. The Board finds that the proposed construction is a reasonable accommodation for Mrs. Philippen-Martone's mother's physical impairment which will allow her mother to use and enjoy her living space, as well as to live in a safe, accessible home where she can be cared for by and enjoy family.

3. The Board further finds that allowing the proposed construction on the side of Petitioners' home would not impose an undue burden or expense on the County, and would not constitute a fundamental disruption or subversion of the County's zoning scheme, which is intended to protect and promote the health, safety, morals, comfort and welfare of the present and future inhabitants of the County. The Board notes in this regard that the Petitioners' property is larger than most neighboring properties, and that the

proposed addition will conform to typical side lot line setbacks along what might appear to a lay person to be a side lot line, but is in fact a rear lot line. See Exhibits 4 and 8(b).

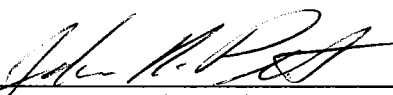
4. In light of the foregoing, the Board finds that the requested twelve (12) foot variance from the required twenty (20) foot setback from the rear lot line, and the requested 9.50 foot variance from the required twenty-five (25) foot side street lot line setback, both of which are necessary to allow the proposed construction to proceed, should be granted on account of Mrs. Philippen-Martone's mother's disability. The Board finds that this is necessary so that the strict application of Montgomery County's Zoning Ordinance and development standards do not deny Mrs. Philippen-Martone's parents an equal opportunity to use and enjoy this dwelling.

Therefore, based upon the Petitioner's binding testimony and evidence of record, the requested variances are granted to allow the proposed construction, subject to the following conditions:

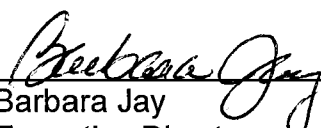
1. The Petitioners are bound by their exhibits of record and testimony, and by the testimony of their engineer.
2. Construction must be completed in accordance with Exhibits 4, 5(a) and 5(b).

On a motion by Stanley B. Boyd, seconded by Edwin P. Rosado, with John H. Pentecost, Vice Chair, and Bruce Goldensohn in agreement, and with Carolyn J. Shawaker, Chair, necessarily absent, the Board adopted the following Resolution:

**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

  
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John H. Pentecost, Vice Chair  
Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 8th day of August, 2017.

  
\_\_\_\_\_  
Barbara Jay  
Executive Director

**NOTE:**

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book. Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.

See Section 59-7.3.2.G.1 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.